BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALLEN RAY SHOUSE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,005,831
SCHULTZ LAWN CARE	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appeals the June 26, 2008, Review and Modification Award of Administrative Law Judge Thomas Klein (ALJ). The ALJ determined that claimant had suffered an additional 5 percent impairment due to his work-related condition and, further, that claimant was permanently and totally disabled from performing any substantial and gainful employment.

Claimant appeared by William L. Phalen, Pittsburg, Kansas. Respondent appeared by Kurt W. Ratzlaff, Wichita, Kansas

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. Additionally, at oral argument to the Board, the parties agreed that the December 9, 2003, deposition of Edward J. Prostic, M.D. with the attached exhibits, the January 22, 2004, deposition of vocational expert Terry L. Cordray, with attached exhibits, and the transcript of Regular Hearing held October 28, 2003, with attached exhibits are all to be included as part of the record in this matter, even though they were not listed in the Award of the ALJ. The medical reports of John M. Ciccarelli, M.D., created from the independent medical examination on April 11, 2006, are also part of this record for the purposes of this appeal. The Discovery Deposition of claimant taken on August 22, 2005, is not part of this record. The Board heard oral argument on October 7, 2008.

ISSUES

The ALJ found that there has been a worsening of claimant's condition that is a natural and probable consequence of his work injury and that claimant is entitled to an additional 5 percent whole person impairment. The ALJ further found that claimant is now permanently and totally disabled.

Respondent contends the ALJ erred by considering factors outside of claimant's workplace injury and argues that claimant is not permanently totally disabled. Respondent requests that the Board reverse the ALJ's Review and Modification Award.

Claimant requests that the Board affirm the ALJ's finding that he is permanently totally disabled.

FINDINGS OF FACT

Claimant had been a full-time employee of respondent for three months when, on May 19, 2002, he slipped and fell, landing on his buttocks and back. Claimant experienced pain in his back and down his right leg. Claimant immediately reported the incident to his supervisor, but did not immediately seek medical treatment. Claimant continued to work for the next month, but his condition worsened. Claimant ultimately requested medical treatment and was referred by his supervisor, Mr. Shultz, to Virendra Patel, M.D. Claimant was also treated by numerous other health care professionals, ultimately coming under the care of James Christensen, D.O. Claimant underwent x-rays, and CT studies of his lumbar spine. Claimant was diagnosed with disc space narrowing at L5-S1 with calcification, a bulging disc and facet degenerative changes at L4-5, a mild disc bulge at L5-S1 and spina bifida occulta at L5-S1. A followup MRI demonstrated L4-5 broad based disc bulging with hypertrophy and stenosis. Claimant reported L5-S1 radiculopathy, which correlated with the clinical exam.

Claimant was referred to William Dillon, M.D. Claimant was treated with steroid medication which provided improvement. He reported significant morning stiffness and migratory swelling of his joints. He ambulated, at times, with a cane. Claimant was diagnosed with rheumatoid arthritis along with his chronic back problems. On December 10, 2002, Dr. Dillon rated claimant at 5 percent to the whole body.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., for an evaluation on January 31, 2003. Dr. Prostic diagnosed claimant with preexisting degenerative disc disease, a transitional vertebra at L5 with vestigial disc at L5-S1, osteophyte formations at L4-5 and mild lumbar scoliosis. He attributed claimant's problems to the fall on May 19, 2002. Dr. Prostic restricted claimant from lifting weights greater than 20 pounds occasionally or 10 pounds frequently. Claimant

was to avoid frequent bending or twisting at the waist, forceful pushing or pulling, use of vibrating equipment, or captive positioning. Claimant was rated at 15 percent to the whole body, based on the range of motion model of the fourth edition of the AMA *Guides*.[1] Dr. Prostic was provided the task analysis of Terrill and Associates and asked to determine what, if any, task loss claimant had suffered from this injury. He determined that claimant had lost the ability to perform 24 of 55 tasks on the list, for a 44 percent task loss.

This matter was settled by Settlement Hearing on April 6, 2004. It was settled on a running award with the right to request future medical treatment and the right to review and modify the award left open. The settlement transcript and worksheet do not specify the basis for the settlement. However, the parties supplied the Board with a letter from Loren M. Hartman, with the Claims Department of respondent's insurance company, dated February 3, 2004, and addressed to claimant's attorney, specifying that the settlement was based on a permanent partial general work disability of 52.25 percent, which the parties agreed was the basis for the settlement. Claimant has not returned to work and began receiving Social Security disability benefits in approximately 2002. Claimant is not looking for work and last worked June 19, 2002. At the time of his evaluation of claimant on August 8, 2003, vocational expert Terry Cordray opined that claimant retained the ability to earn $7.50 per hour in the open labor market. This equates to a wage loss of 25 percent.

Claimant suffers from rheumatoid arthritis, which he acknowledges is unrelated to his work injury, and which he agrees is at least partially the basis for the Social Security award. Claimant also suffered a heart attack in August 2006 and is being treated by Dr. Dykstra and has been instructed to avoid heavy lifting, exertion, and stress.

Claimant's attorney, almost immediately after the settlement, filed an Application For Post Award Medical (E-4) on June 14, 2004, requesting additional medical treatment with Richard B. Lies, M.D. Dr. Lies was authorized to provide medical treatment with ongoing medication. Dr. Lies, who is not an orthopedic surgeon, requested that claimant be referred back to Dr. William Dillon. A second E-4 was filed on June 27, 2005, requesting medical treatment with Dr. Dillon. The matter went to preliminary hearing on August 24, 2005, at which time claimant was noted to have no change in his condition or any increase in pain. The ALJ, in his Order of November 21, 2005, found that Dr. Lies was the authorized treating physician, that claimant had not satisfied his burden of proving a change in condition or a need for the matter to be reviewed by Dr. Dillon, and denied the referral to Dr. Dillon. On January 9, 2006, claimant filed a Demand For Compensation requesting the benefits listed in the Order of the ALJ from the August 24, 2005, hearing, pursuant to K.S.A. 44-512a, or penalties and attorney fees would be sought.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

A third E-4 was filed on December 14, 2005, again requesting medical treatment with Dr. Dillon, and a fourth E-4 was filed January 17, 2006, requesting treatment with an orthopedic surgeon and ongoing pain management. The matter was noticed for a Post Award Hearing on March 8, 2006, but the file contains no transcript for that hearing. The report of John M. Ciccarelli, M.D., for April 11, 2006, indicates the referral was by the ALJ, but no such order is found in the file. A fifth E-4 was filed on May 10, 2006, requesting medical treatment as recommended by Dr. Ciccarelli in his IME report of April 11, 2006. A Notice of Post Award Hearing for July 12, 2006, is contained in the file. But, no hearing was held on that date.

Claimant was evaluated by Dr. Ciccarelli on April 11, 2006, pursuant to what appears to be an Order of the ALJ. Dr. Ciccarelli diagnosed claimant with L4-5 spondylolisthesis, a broad based disc protrusion at L4-5 with compression across the descending L5 nerve roots and resulting radiculopathy, mild spinal stenosis, a mild disc bulge at L5-S1 and spina bifida occulta at L5-S1. He determined the spondylolisthesis preexisted claimant's accident but may have been asymptomatic. He recommended facet blocks and epidural injections to the L4-5 area, but no other surgery. His recommendations include additional studies of claimant's rheumatologic status and a new MRI to evaluate claimant's L4-5 stenosis and lateral recess narrowing.

Claimant was referred back to Dr. Prostic by his attorney on January 24, 2006. X-rays indicated degenerative changes of the lumbar spine, with short pedicles at L4-5. Dr. Prostic rated claimant with an additional 2 percent for loss of forward flexion of the lumbar spine and 3 percent for loss of extension for a total of 5 percent additional impairment. Dr. Prostic did not change claimant's restrictions although he noted the frequency of bending and twisting should be kept at the low end of occasional rather than the high end. Dr. Prostic went on to find that claimant was unable to perform any substantial and gainful employment and was realistically unemployable.

On June 28, 2007, claimant filed an Application For Review And Modification, form E-5. The matter was noticed for hearing, and a hearing was held on September 5, 2007. Terminal dates were set, with extensions on several occasions being granted to the parties. While the matter was being prepared for submission, claimant filed a sixth E-4 on February 22, 2008, requesting medical mileage for an appointment to Dr. Eyster on January 10, 2008. There is no report from Dr. Eyster contained in this file. A post award hearing was set for March 26, 2008, but then cancelled.

Claimant was referred to board certified neurosurgeon Paul S. Stein, M.D., by respondent's attorney for an examination on January 10, 2008. Dr. Stein was provided medical records from May 26, 2002, forward for his review. He noted claimant was originally diagnosed with disc degeneration and radiculopathy. During the examination, claimant was seen to walk slowly, but without a limp. There was no atrophy in either leg, although claimant did display some difficulty walking on his heals and toes. Claimant had

no sensory deficit in either leg. His reflexes were intact, and there was no muscle spasm displayed. Dr. Stein diagnosed right lower extremity radiculopathy from the 2002 injury, and the diagnosis remained the same in 2007. Dr. Stein rated claimant at a 10 percent whole body impairment based on the fourth edition of the AMA *Guides*,[2] lumbosacral category III. Clamant was restricted to avoid lifting more than 30 pounds with any single lift up to twice per day, 20 pounds occasionally, and 10 pounds frequently. Claimant was to avoid repetitive bending and twisting of the lower back and avoid lifting from below knuckle height or above chest height. Claimant was to alternate standing, sitting and walking as required. Dr. Stein opined that claimant could return to work within Dr. Stein's restrictions.

Claimant submitted his evidence to the ALJ on March 10, 2008, with respondent submitting by March 17, 2008. The ALJ deemed this matter fully submitted on May 14, 2008, with the Review and Modification Award being filed on June 27, 2008. In the Award, the ALJ found that claimant had proven that he had suffered an additional 5 percent impairment due to his work-related condition, and that claimant is now permanently and totally disabled from substantial and gainful employment.

Claimant testified at the Review and Modification Hearing on September 5, 2007. At that time, he described worsening pain, with left leg pain and a lack of range of motion. The report of Dr. Prostic from January 24, 2006, fails to mention left leg pain. Claimant testified the left leg pain went away before he saw Dr. Prostic, but came back some time later. Claimant stated the current pain was worse than in October of 2003. The pain in his right leg goes to his toes as it did originally, but claimant states the pain is worse. Claimant testified that he was physically unable to work, but acknowledged that he alleged that he was physically unable to work in 2004 as well. Claimant continued to suffer from rheumatoid arthritis, which claimant agreed was not related to his work accident with respondent. Claimant also testified to having a heart attack in August 2006 which was not related to his work. Claimant is being treated by Dr. Dykstra for this heart condition. He is to avoid heavy lifting and stress due to the heart condition. With the exception of those from Dr. Dykstra, claimant has been given no additional restrictions since the settlement in 2004.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

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[2] AMA *Guides* (4th ed.).

[3] K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.[5]

K.S.A. 44-528(a) states:

> (a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

Claimant argues that his condition has changed to the point that he is now permanently and totally disabled and a modification of his award to that degree is appropriate. Claimant has testified to a worsening in his pain levels and a reduced range of motion and testified to radiculopathy in his left leg, a symptom not present at the time of the original award.

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.[6] If there is a change in the claimant's work disability, then the award is subject to review and modification.[7] In review and modification proceedings, the burden of

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[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[6] *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

[7] *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 929 P.2d 788 (1996).

establishing the changed conditions is on the party asserting them.[8] Our appellate courts have consistently held that there must be a change of circumstance, either in claimant's physical or employment status, to justify modification of an award.[9]

Claimant argues a worsening of his condition justifies an award for permanent and total disability. Respondent argues first that claimant's condition has not changed and no alteration of the award is proper. Respondent also argues that claimant has failed to prove that he is permanently and totally disabled, even if a modification is found to be justified. Claimant's contentions are hinged on the testimony of Dr. Prostic, who found claimant to have an additional 5 percent whole body impairment. However, Dr. Prostic acknowledged that claimant's limitations had altered very little and necessitated only a minor adjustment in claimant's restrictions. The restrictions from Dr. Prostic were considered by Mr. Cordray when he opined that claimant could earn $7.50 per hour in the open labor market. That ability does not appear to have been seriously impacted by claimant's changed condition. Additionally, the migration of claimant's radiculopathy into claimant's left leg does not appear to be supported by the examinations of Dr. Prostic or Dr. Stein. Finally, Dr. Stein found claimant to be capable of working in the open labor market within the restrictions set by Dr. Stein. The Board finds that claimant is not permanently and totally disabled from employment and an award for same is denied.

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.[10]

Claimant settled this matter based on a 52.25 percent work disability. While it might be possible to review and modify this award based on a work disability, there is no evidence in this record to show that claimant's disability in the form of a task loss or wage loss has increased. Without evidence of a change, no review of the original work disability is justified.

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[8] *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 598 P.2d 544 (1979).

[9] *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978).

[10] K.S.A. 44-510e.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be reversed and claimant's award for a permanent and total disability is denied. Claimant has failed to prove that he is permanently and totally disabled and entitled to a modification of the award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Review and Modification Award of Administrative Law Judge Thomas Klein dated June 26, 2008, should be, and is hereby, reversed, and claimant is denied any modification of his original award.

IT IS SO ORDERED.

Dated this ____ day of January, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Kurt W. Ratzlaff, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge